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Supreme Court of the United States

OCTOBER, 1929

No. 457

ALPHA STEAMSHIP CORPORATION, WILLIAM H. A. WALKER AND FRANK DALY, copartners doing business under the firm name and style of Walker & Daly,

Petitioners,

against

ROBERT CAIN,

Respondent.

BRIEF FOR RESPONDENT.

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BRIEF FOR RESPONDENT.

Statement.

Numerical references in this brief designate pages of the transcript of record unless otherwise indicated.

The writ of certiorari herein brings before this Court for review a decree of the Circuit Court of Appeals for the Second Circuit, entered August 27, 1929 (366-7) affirming a judgment of the District Court for the Southern District of New York, entered on January 3, 1929 (13-14) after trial before Honorable Julian Mack, Circuit Judge, and a jury.

The copy of the judgment of the District Court appearing in the record is for a total of $12,867.50 (13-14).

This is erroneous in reciting and assuming that the verdict was for $12,500.00 whereas the verdict actually rendered was $12,000.00 (342). This difference of $500, together with the interest thereon, makes the total difference of $508.50 between the erroneous amount and the correct amount. The correct amount $12,359.00, appears in the petitioners' notice of appeal to the Circuit Court of Appeals (346).

The action was brought and the judgment recovered for damages sustained by respondent in consequence of an assault upon him, while he was employed by petitioners as a fireman on their American oil tanker the steamship *Alpha* (1, 2), committed by one Jackson, who was petitioners' second assistant engineer and respondent's superior officer (24-5).

Pleadings and Issues.

It was alleged in the complaint and admitted either on the pleadings or tacitly at the trial that the respondent at the time of the assault was in the employ of the petitioners as a seaman (fireman) on the steamship *Alpha* operated by the petitioners (2, 6, 7, 18, 136); that Jackson, who committed the assault, was at that time also in the employ of the petitioners as second assistant engineer of the vessel; that as such second assistant engineer he was respondent's superior and was, in fact, at the time of the assault (about one A. M. on the morning of February 6, 1927) in charge of the engine room watch which began at midnight on the fifth and terminated at four A. M. on the sixth (98, 203). It was further undisputed that previously to the assault there was no ill feeling and no quarrel between the respondent and his superior, Jackson (229).

The principal, and practically the only controverted issue of fact was whether Jackson did commit the assault. A further issue submitted to the jury was as to whether if Jackson did commit the assault he was acting at the time in the course and furtherance of his employment. The complaint alleged in all, six causes of action. Of these, all but two were either withdrawn by the respondent or dismissed by the court. The cause of action upon which recovery was had was the first, which alleged in substance that Jackson, while acting in the course of his employment as second assistant engineer of the vessel, struck plaintiff over the left eye with a wrench or other metal instrument, destroying the vision of the eye (2).

It is appropriate to refer to two of the other causes of action. In the second cause of action it was alleged that the petitioners negligently failed to protect respondent from assault by Jackson although they "had knowledge of the circumstances in ample time so to do" (3). In support of this cause of action, evidence was introduced to the effect that Jackson for a period of at least ten hours immediately prior to the assault had been in a condition of intoxication and obviously unfit for duty, and that the captain was or should have been aware of his condition (107-8, 109-110). Upon this cause of action the jury disagreed (341-2).

In the fifth cause of action respondent alleged the failure of the captain to enter in the official log book of the vessel a statement of the assault by Jackson and to report the assault and to surrender Jackson to the proper authorities when the vessel reached the port of New York, and alleged that by reason of such neglect Jackson had escaped (4). It was further alleged that such neglect and escape constituted a violation of the provisions of the Federal

Statutes which forbid flogging and corporal punishment—U. S. Code, Title 46, Section 702, 712 (4-5). This cause of action was dismissed (126, 129-30, 292). The Trial Court dismissed this cause of action on the ground either that omitting to report Jackson and allowing him to leave the jurisdiction of the port—and apparently the country (128, 232)—did not constitute an escape under the statute (129, 292), or that the statute contemplated an indemnity for the consequences not of the assault, but only of the escape.

In view of the determination below we shall summarize the facts material to the first cause of action upon which respondent has prevailed.

Facts.

Respondent, a British seaman (17), between 12:40 and 1 o'clock in the morning of February 6, 1927, while employed by petitioners as a fireman on their oil tanker *Alpha*, was struck twice by his superior officer, one Jackson, the second assistant engineer, with a monkey wrench, as a result of which assault respondent has permanently lost the vision of his left eye (23-5, 29, 69-70, 89-90). The assault was committed upon the deck of the vessel which was then lying in the harbor of Port Amuey, Venezuela, preparing to clear for her return voyage (24-5). [The correct name of this port does not appear in the transcript of record. We take it from petitioners' brief, p. 2.]

It is to be noted that, according to the testimony on both sides, the *Alpha* was preparing to put to sea with many of its personnel the worse for liquor (26-7, 63, 104, 107-10, 136, 240-1, 303, 306). Jackson, himself, testified to the effect that the ship was preparing to leave within the next hour or two (198, 203-4, 232-3).

Jackson, at the time of the assault, was in charge of the engine room and fire room and in command of the engine room personnel (198, 203, 208). The respondent was the fireman assigned to the twelve to four watch and it was, of course, likewise his period of duty (203).

Respondent had stood an extra watch the day before (20, 285), and had then gone ashore. He had returned to the ship at about half past four in the afternoon, eaten his supper and a little later had gone to bed (23). He was called at eleven-thirty and answered, but fell asleep again, and woke at about twenty minutes past twelve. He then rose, dressed, went to the saloon and drank a cup of coffee, then started to descend the stairs leading down to the engine room. He got to the second grating, where he met the first assistant engineer, who was intoxicated (24, 26, 40-41). The first assistant reprimanded respondent sharply for being late, and struck him twice with his fist (24). The respondent, an unusually small man (41), freed himself and went up the ladder to the top grating. He turned then and looked down and saw that the first assistant was not pursuing him. He stepped out on the deck, then came back and looked down to the engine room, where he saw the first and second assistants in conversation, the first pointing upward toward the respondent (24). Thereupon, the second assistant started climbing up the ladder.

Respondent's testimony as to this occurrence, and as to what immediately ensued, is as follows:

> "He pointed up towards me and then the next thing I seen the second assistant coming up. He came all the way up and spoke to me and he said, 'What to do with you?'.
>
> Q. That means 'What is the matter?' is that right? A. I don't know what is the matter with him;

I wanted to know what is the matter with the first engineer, the first assistant. That is what I said to him. I said to him, 'I don't know what is the matter with me, what is the matter with the first assistant?' He told me I was a bit late. I says to him, 'Yes, I am a bit late, I overslept'. And he said, 'Late be damned', and he says to me and struck me across the head with a monkey wrench. I fell back like this (indicating), and as I fell back like that, he tapped me over the eye with the monkey wrench. I fell again, right on the deck and then I got up and I run on my knees and hands away from him. I got over to the starboard side of the boat, running around the stern, and I got over to the starboard side, and on the starboard side, I met the steward. He said, 'What is the matter?' I kept running on and looking back to see if the second assistant was following me. When I was running along and looking back to see if he was following me, I tripped over a steel casing. I picked myself up again and started to run to the captain's room. I got inside the captain's room and I said to the captain, 'The second assistant engineer has struck me with a monkey wrench.' The captain took me down to the salon, and got me down there, and he dressed me, and while we were in there and he dressed me, the first and second assistants came in * * *.

Well, when I was in there being dressed by the captain, the first and second assistants came in, and I pointed to the second assistant and I told the captain, 'There is the man that done that', pointing to the second assistant.'

The captain chased the first and second assistants right out of the salon; he chased them both out of the salon. Then he dressed me up, and chased me forward. He dressed my head and my eye and sent me forward with two men to help me.

Q. And you went into your bunk, did you? A. Yes, sir" (24-6).

The respondent testified that when the second assistant came up the stairway, he had a monkey wrench in his left hand and a flashlight in his right, and he came up staggering and swaying from side to side (26). He testified that the second assistant was drunk at the time, and that as he followed the respondent, he said: "I will teach you to go down on your watch, you bastard" (26-7). He also testified that at no time when he fell did he hit his eye or head, but only his arms and leg, and that the place where he tripped over the steel casing was not near to the second assistant (27-8).

The reference in the testimony above quoted to "seeing the steward" on the deck at the point of the assault (25) is a mistake. The word "steward" should read Stewart, the name of a seaman who was on the deck near the point where the assault occurred.

Stewart, a young man residing in Miami, Florida, in the home of his father and mother, was on the *Alpha* as an ordinary seaman. He did not see the assault, but saw both Cain and Jackson immediately afterward. He testified to what he saw as follows:

> "Well, as I was sitting at the corner of the hatch, I saw Cain come around the corner aft of the deck house, the engine room, and I looked up and I saw he was running. His face and shirt was covered with blood, and in a few moments, right behind him, came Jackson, the second assistant. Jackson had in his hand a monkey wrench and a flashlight in each hand * * * the flashlight in the right hand and the monkey wrench in the left hand, and as Cain went by me, I hollered to him, 'What is the matter?'

and he didn't answer, and just at that moment Jackson popped up around the corner and said 'Stop him!'. I said 'What is the matter with him?' He said, 'I will teach him to (get) down on watch', and he was cursing him, using curse words" (104-5).

After the *Alpha* had left New York on her next voyage, Stewart, who was still a member of the crew of the *Alpha*, signed a statement (Defendant's Exhibit B—112-3, 344-5). This statement was not taken on February sixth, the day of its date, but on March fourteenth or fifteenth following, apparently after the ship had completed the subsequent voyage. This statement was put in evidence by the petitioners—for what reason, is not clear. It is in precise accord with the testimony given by the witness at the trial. It does not contain any mention of the fact that the second assistant engineer was drunk, but Stewart explained that he was not asked anything on that point and that the statement was made up simply of questions put to him by someone at the instance of the ship, and his answers.

Jackson, himself, testified that after a conversation with the first assistant, he ascended the ladder to the deck where respondent stood. Jackson said, referring to the time when he was ascending the ladder, "I hollered to him to come on down" (198). Jackson said his purpose was to get a wiper to act as fireman in place of respondent, but it is to be noted that he shouted to respondent to come down, and even, when he got to the top, instead of ordering the wiper who sat there to go down on duty and take Cain's watch, he continued to follow respondent (199) until he came to the saloon where the captain was dressing the wound, where he first learned how badly respondent was hurt (220). It was not until respondent was relieved of duty

and sent to bed that Jackson directed the wiper to report and stand respondent's watch. The witness testified that Cain and he worked the same watch from twelve to four (228). He further testified that he and the respondent were not on bad terms, and that he had nothing against the respondent, and, so far as he knew, the respondent had nothing against him (229), and in all that Jackson did, and in all that he said, he was acting not by reason of any malice but in the performance of his duty (231-4).

Notwithstanding the number of witnesses who testified, the only important question of credibility was that presented by respondent's testimony that Jackson struck him with the wrench and Jackson's denial of having done so.

The case was submitted to the jury on the first and second causes of action. It was submitted in a very clear and careful charge. One issue was common in each of the two causes of action, *i. e.*, as to whether Jackson had committed the assault as alleged. The only other issue as to the first cause of action was whether or not he committed the assault while acting as petitioners' employee and respondent's superior, the second assistant engineer.

The jury having determined these issues in favor of respondent, it is submitted, for the reasons set forth under the following points, that none of the objections of the petitioners to the judgment under review are valid and that that judgment should be affirmed.

POINT I.

The civil responsibility of the petitioners under the rule *respondeat superior* for the assault which their employee Jackson committed while acting in the course of his employment is established by authority, is not dependent upon statute and is founded upon unassailable principles.

The contention that petitioners' responsibility is barred by a narrow admiralty exception to the rule *respondeat superior* or by a surviving vestige of the fellow servant rule is sheer special pleading, unsupported by authority, contrary to well considered decisions, and utterly devoid of intrinsic merit. Upon this review petitioners rely principally upon the contention that the rule *respondeat superior* is not and has never been a part of the maritime law so far as concerns the liability of the employer for indemnity to a seaman injured through the fault, whether negligent or wilful, of any other member of the crew, including the officers and the master. As to the master, petitioners do indeed concede the existence of a duty to protect the seaman but they insist that this is a part of the seaman's contract with his employer, with the necessary result that an assault by the master or an assault which the master unreasonably or negligently fails to prevent (or which he afterwards "ratifies") gives rise to a liability on the part of the employing owner or other employer, but on the ground not of the application of the rule *respondeat superior*, but of a breach of the employer's contractual warranty of good treatment, a basis very similar to that upon which is rested recovery of damages for failure on the

part of the ship to care properly for a seaman who has become sick or disabled.

Before calling attention to the decisions and reasons which disclose the petitioners' position as both contrary to precedent and unsound in principle, it is appropriate to observe the eccentric result to which their contention leads. First of all, counsel assumes, and the overwhelming preponderance of authority is clear, that if this assault had taken place on shore or under circumstances governed by non-maritime law, the rule *respondeat superior* would apply. He further assumes that if the injury had occurred, as it did, in the maritime jurisdiction but had been done inadvertently and negligently, the rule *respondeat superior* (now that the fellow servant rule has been swept away by statute), would likewise have applied, and even though it were a wilful assault and committed on shipboard, petitioners concede a right to indemnity from the employer if the assault was committed by the captain. This proposition is, then, that the respondent is defeated by the concurrence of three conditions: (a) that the injury was wilful rather than negligent; (b) that the rights and liabilities growing out of this injury are governed by maritime rather than by non-maritime law; (c) that the fault is that of some employe other than the captain.

For the following specific reasons the petitioners' contentions are opposed to authority and indefensible in principle:

1. The principle *respondeat superior* is of universal application and is a part of the maritime as well as of the common law.

There is, of course, nothing in the maritime law as distinguished from the common law or in maritime relations

as distinguished from others, which precludes the operation of the rule *respondeat superior*. The operation of that rule is manifest in the responsibility of carriers by sea for the acts of their representatives which is broadly parallel to the like responsibility of carriers on land. The operation of the rule *respondeat superior* is likewise apparent in the general responsibility of operators of ships for the torts committed by their employes to whom the actual functions of operation are entrusted.

Nor is the similar operation of the rule *respondeat superior* in both the maritime and non-maritime jurisdictions an instance of a legal principle becoming "amphibious". It is not even necessarily an instance of one jurisdiction borrowing from the other. It is, rather, the operation, in the different courts administering the law in each jurisdiction, of the same principle of responsibility. To say this is, of course, not to deny that decisions in each of these jurisdictions have been powerfully influenced by those of the other. The same interplay and development of the law of different jurisdictions in contact with each other is seen in the progress of equitable principles in controversies tried at common law and before common law courts. The same tendency is further observable when the equity jurisdiction itself follows legal analogies. Without pretending to exhaustive study, we believe a detailed comparison of the growth of common law, civil law, and ecclesiastical law rules would disclose to a greater or less extent a similar interaction.

But whatever the origin of the rule *respondeat superior*, whether it be a principle of maritime law which has established a habitat on shore and made its way into the system of the common law, or is really originally a shore product which has become "amphibious", the testimony of the deci-

sions both in this country and in England is clear and uniform to the effect that the principle is a part of the maritime law.

Workman v. *New York City, Mayor, etc.*, 179 U. S. 552;
The Plymouth, 3 Wall. 20, 35;
Vasey v. *Mayor, etc., of Baltimore* (The F. C. Latrobe), 28 Fed. 377, 378-9;
The M. Moxham, 1 P. D. 107, 110, 113, 114;
The Leon, 50 L. J. Adm. 59, 6 P. D. 148;
Smith v. *Steele*, 44 L. J. Q. B. 60;
Hedley v. *Pinkney & Sons Co.*, A. C. 222, 1894.

The case of *Workman* v. *New York City, Mayor, etc.* (*supra*), was a libel *in personam* brought by the owner of a British barkentine which in June, 1893, while moored to a pier in the East River, was struck by a steam fire boat belonging to and operated by the City of New York. This Court held that the case was to be governed by the maritime law (179 U. S. 557-63). The Court then proceeded to inquire whether under the maritime law the city was liable for the damage done to the libellant's vessel. In its opinion the Court said, Mr. Chief Justice White writing (179 U. S. 565):

> "That, upon such a state of things, the relation of master and servant existed between the City of New York and those in charge of the fire boat is clear. And that under the general maritime law, where the relation of master and servant exists, an owner of an offending vessel committing a maritime tort is responsible, under the rule of *respondeat superior*, is elementary."

Again the Court said (*id.*, 573):

> "A recovery can be had *in personam*, howeve
> for a maritime tort when the relation existing b
> tween the owner and the master and crew of t
> vessel, at the time of the negligent collision, w
> that of master and servant."

In the dissenting opinion in that case the general appl
cation of the rule *respondeat superior* to maritime tor
was not questioned. The only basis of the difference
opinion was the circumstance that the fire boat which d
the damage was actually being operated for the purpo
of getting to the scene of a fire and helping to extingui
it. The minority view was that this was the performan
of a governmental function and that a wrong done incide
to such a function was non-actionable under the maritim
law as well as under the common law (179 U. S. 585-6

In the case of *Vasey* v. *Mayor, etc., of Baltimo*
(*supra*), the District Court of Maryland (Judge Morri
sustained a similar libel *in personam* brought against t
City of Baltimore for damages sustained by the libellant
steamship in Baltimore Harbor as a result of being stru
by the *F. C. Latrobe*, a steamer owned and used by t
City of Baltimore for the purpose of breaking the ice a
keeping the harbor free from obstruction. The Cou
having determined that the navigation of the *Latrobe* w
negligent, proceeded to hold that the City was liable in
action *in personam* under the rule *respondeat superi*
So far as the opinion suggests any difference between t
common law application of the rule *respondeat superi*
and its scope in admiralty, the latter is indicated as t
more extensive. Thus the Court says:

> "The rule of the maritime law is that the own
> is always personally responsible for the negligen

or unskillfulness of those navigating his vessel except only those cases in which the possession and control of the vessel has passed to a charterer or other person so completely that the other person not only appoints the master and crew, but directs both the destination and employment of the vessel and her mode of navigation" (28 Fed., 378-9).

The English decisions are equally unequivocal in their holding that the rule *respondeat superior* is a part of the maritime law.

The case of the *M. Moxham* (*supra*), was a suit against a British vessel for damage done by negligently striking a wharf in a Spanish port. The question was whether the owners who employed the master and crew navigating the vessel could be held responsible. The form in which the question came up was upon the controversy as to whether the Spanish or the British law applied. It was necessary to determine that question because if the British law applied, the rule *respondeat superior* was applicable, and its operation would render the owners liable. If the Spanish law applied, the rule *respondeat superior* was not available and the owners could not recover. The Court held that the Spanish law applied and therefore dismissed the libel.

The case of *Smith* v. *Steele* (*supra*), was a suit by the executrix of a Thames pilot for his death which it was alleged was due to the negligence of defendant's servants in the management and operation of defendant's vessel. The defendants' vessel was lying at a dock and about to proceed on a voyage in which they were obliged by law to engage a pilot. They engaged the decedent in that capacity. He went aboard the vessel to give directions to the crew for getting the vessel out of the dock. While on the vessel, a boat which had been negligently slung fell

upon him and killed him. It is obvious that whatever rights accrued to the decedent or to his estate in consequence were based upon maritime law. Yet the plaintiff's executrix sued in a common law tribunal, the Court of Queens Bench. The defendants relied upon the fellow servant rule. The Court held that the deceased pilot was not a fellow employee of the crew or of the master of the defendant's vessel and upon that express ground allowed recovery.

2. Moreover, the application of the fellow-servant rule to maritime torts both in this country and Great Britain necessarily involves the application of *respondeat superior*, or at least negatives the contention that *respondeat superior* does not apply where the right to maintenance and cure does. The cases of injuries due to negligence as well as those due to wilful assault are within the field of maintenance and cure. If the rule *respondeat superior* does not apply to such cases, why has the application of the fellow-servant rule in those cases been declared by this Court (*The Osceola*, 189 U. S. 158; *Carlisle Packing Co.* v. *Sandanger*, 259 U. S. 255, 258-9)? The appearance of the fellow-servant rule in these cases, notwithstanding the insistence of certain Law Review commentators ("The Extension of the Fellow-servant Doctrine to Admiralty", 18 Harv. Law Rev., 294; "*Respondeat Superior* in Admiralty", 19 *id.* 445; "The Common Law Courts and the Law of the Sea", 36 *id.* 777), is not accidental nor sporadic. The same rule has been applied by the English courts, *e. g.*:

> *Hedley* v. *Pinkney & Sons S. S. Co.*, A. C. 1894, 222.

In that case the owners were sued for injuries sustained by an employe caused by the captain's negligence in failing

to put certain stanchions and rails in place. The House of Lords held that he could not recover because the captain and he were fellow servants, citing, it may be noted, in support of that conclusion the decisions reached in certain non-maritime causes (*Wilson* v. *Merry*, L. R. 1 H. L. So. 326; *Johnson* v. *Lindsay*, 1891 A. C. 371).

3. Manifestly, there is nothing inherent in the right of a seaman to maintenance and cure which precludes him from relying on the rule *respondeat superior*. The right to maintenance and cure is an incident of the employment, derived in the first instance from necessity and interest as well as from considerations more humane—a sailor who is hurt or sick at sea or in a foreign port obviously cannot be put off the ship or allowed to starve on the ship. Indeed it has been noted that "the term *cure* was probably employed originally in the sense of *taking charge or care of* a disabled seaman and not in that of positive healing" (*The Atlantic*, Abb. Adm. 451 at 480, cited and quoted by Fitz-Henry Smith in an article on "Liability in the Admiralty for injuries to seamen", 19 Harv. Law Rev., 418 at 436). This is a kind of disability insurance and is paid for actually and ultimately, if not visibly, from the seamen's wages.

What is there about this right which excludes the seaman from the benefit of other rules of law available generally both at sea and on shore? In what possible way does the right to maintenance and cure conflict with the right to indemnity for injuries? No such conflict has been encountered in according the seaman redress for conditions amounting to unseaworthiness, or for injuries due to negligence—now that the fellow-servant rule has been abolished by statute. None apparently is found if he is assaulted by his captain (Petitioners' Brief, p. 7), but if it so happens

that the assault is committed by some other officer, the suggestion is that the seaman's right under maritime law to maintenance and cure is exclusive and that there is no right to receive compensatory damages, which could otherwise be recovered through the rule *respondeat superior*.

No reason for this eccentric exception to the operation of the rule *respondeat superior* is suggested, and no pertinent authority for such an exception is cited.

Moreover, the contention that there is any inconsistency between the right to maintenance and cure and the right to indemnity for injuries due to fault under the rule *respondeat superior* is conclusively negatived by the decisions of this court in the cases holding that under the Merchant Marine Act of 1920 the two rights are both preserved, and that even acceptance of the benefit of the right to maintenance and cure does not preclude a recovery by action for damages sustained and not compensated by the benefits so received. *Panama R. R. Co.* v. *Johnson*, 264 U. S. 375; *Pacific S. S. Co.* v. *Peterson*, 278 U. S. 130.

In the Peterson case (*supra*) this court, in its opinion, written by the late Mr Justice Sanford, sustained the right to recovery by a seaman who had already received his wages to the end of the voyage and had then been afforded maintenance and treatment by the defendant after the termination of the voyage. The Court said:

> "• • • there is no inconsistency between the right to recover compensatory damages under the new rule for injuries caused by negligence and the right to recover maintenance, cure and wages under the old rules, the remedies not being of such a nature that the adoption of one is a repudiation or negation of the other • • •. In short, the right to maintenance, cure and wages, implied in law as a con-

> tractual obligation arising out of the nature of the employment, is independent of the right to indemnity or compensatory damages for an injury caused by negligence; and these two rights are consistent and cumulative" (278 U. S., 137-8).

4. Nothing in the opinion of this Court in the case of *Chelentis* v. *Luckenbach S. S. Co.*, 247 U. S. 372, lends itself to petitioners' argument. That case arose before the Merchant Marine Act of 1920, and decided the controversy as to the construction of the prior enactment, the La Follette Act of 1915, in particular the provision "Seamen having command shall not be held to be fellow servants with those under their authority * * *." The plaintiff contended that that act eliminated the fellow-servant rule and so entitled the plaintiff to recover. The defendant argued that the scope of the provision in the La Follette Act was much narrower; that it really intended merely to state that masters of vessels were not fellow servants of seamen. The Court adopted the latter and stricter construction, holding that:

> "The language of the section discloses no intention to impose upon ship owners the same measure of liability for injuries suffered by the crew while at sea as the common law prescribes for employers in respect of their employees on shore."

The opinion relied on and reiterated the rule laid down in *The Osceola* and held that the La Follette Act had not changed that rule in any way applicable to the case.

That such was the sole import of that decision is further evidenced by the different result reached in cases arising under the Merchant Marine Act of 1920. The latter statute, extending to seamen suffering personal injuries in the course of their employment the provisions of the

Employers' Liability Act, abolished the fellow-servant rule in maritime relationships as completely as the earlier statute had done in non-maritime employments. This Court at once held that a seaman thereafter sustaining injuries by reason of negligence on the part of another of the ship's crew, committed in the course of the latter's employment, could recover indemnity for such injuries.

Panama R. R. Co. v. *Johnson*, 264 U. S. 375.

It is clear, therefore, as the Circuit Court of Appeals pointed out (364), that the only basis in admiralty, as at common law, for the elimination of the rule *respondeat superior* is the fellow servant rule. The determining consideration, therefore, is as to the scope of that rule. Does it apply, according to the import of its invariable form, only to cases of negligence or is it at this date to be extended to cases of wilful assault? That inquiry, moreover, must cover common law as well as maritime law, for it is clear that the scope of the rule is the same in this respect in these two jurisdictions. Indeed this Court, like the English courts, treats the rule as the same whether applied in a maritime or a common law case (*International Stevedoring Company* v. *Haverty*, 272 U. S. 50, 52).

5. The answer to the question whether the fellow servant rule extends to cases of wilful assault is, we believe, not doubtful. Neither in the *Osceola* nor in any other well considered case can authority be found for applying the fellow-servant rule as a bar to an action for an assault or other wilfully inflicted injury. On the contrary the overwhelming weight of authority, Federal and State, Common Law and Admiralty, is that the fellow-servant rule is inapplicable in an action brought by an employee against his

employer to recover damages for injuries wilfully inflicted by a co-servant.

Wolfe vs. *Thomas*, 268 Fed. 464, 467;
Memphis & N. Packet Co. vs. *Hill*, 122 Fed. 246;
Hall vs. *Sims* (*The General Rucker*), 35 Fed. 152;
The Vueltabajo, 163 Fed. 594;
Gabrielson vs. *Waydell*, 67 Fed. 342;
Spencer vs. *Kelley*, 32 Fed. 838;
Richard vs. *Amoskeag Mfg. Co.*, 109 Atl. 88 (N. H.) s. c. 8 A. L. R. 1426;
Palos Coal & Coke Co. vs. *Benson*, 145 Ala. 664, 39 So. 727;
Avondale Mills vs. *Bryant*, 10 Ala. App. 507, 63 So. 932;
Jebeles-Colias Confectionery Co. vs. *Booze*, 181 Ala. 456, 62 So. 12;
Tillar vs. *Reynolds*, 96 Ark. 358; 131 S. W. 969; 30 L. R. A., N. S. 1043;
Roberts vs. *Southern R. R. Co.*, 143 N. C. 176, 55 S. E. 509; 8 L. R. A., N. S. 798;
Fleming vs. *Tarboro Knitting Mills*, 161 N. C. 436, 77 S. E. 309;
Rogahn vs. *Moore Mfg. Co.*, 79 Wis. 573, 48 N. W. 669.

All of the maritime decisions above cited necessarily involve the exclusion of the application of the fellow-servant rule in cases of a wilful assault. In the case of *Memphis & N. Packet Co.* vs. *Hill* (*supra*), the defendant urged the fellow-servant rule as an objection to the plain-

tiff's judgment. The Circuit Court of Appeals for the Eighth Circuit in that case expressly held that rule inapplicable to the case of a wilful assault. The court in its opinion, Judge Thayer writing, after alluding to the contention that the fellow servant rule was applicable, said (122 Fed. at 247):

> "But this doctrine, we think, has no application to the case in hand. The injuries complained of by libellant were not occasioned by the negligent act of Wright while he and the libellant were working side by side as fellow servants, but they were wilfully and wrongfully inflicted when Wright was acting as an officer of the boat, to wit, as captain of the watch, having been placed in that position of authority by the mate, and by virtue of holding that office had the same power to give orders to the deck hands and direct them in what to do as the mate."

An examination of the cases above cited decided by the courts of various states discloses the same preponderance, a virtual unanimity, in support of the rule that the employer is liable to his employee for a wilful assault committed by a co-employee acting within the scope of his employment. In fact, this principle is so widely held that we have found no instance in which there was even discussion of the question as to the application of the fellow servant rule. That rule has invariably been stated as being to the effect that the employer is not liable to the employee for injuries caused by the *negligence* of a fellow servant. The only instance among the decided cases in either the common law or the maritime actions where the argument has been seriously advanced that the same rule applied in the case of a wilful assault was in *Memphis & N. Packet Co.* v. *Hill* (*supra*), where the Circuit Court of Appeals for the Eighth

Circuit rejected the contention on the ground that the fellow servant rule was not applicable to such a case.

The fellow servant rule, even when restricted to negligence cases, was of questionable soundness at its inception and has tended, with the subsequent progress of industry, to become less acceptable to the general policy underlying the legal responsibility of the employer. This tendency to restrict rather than extend the fellow servant rule is sufficiently attested by the limitations imposed by judicial decisions and by the successive legislative enactments which have curtailed and finally eliminated entirely in many cases the fellow servant exception to the employer's liability. In cases of wilful assault, this rule has never at any time received the sanction of the weight of judicial authority.

The scarcity of early cases holding the principal responsible for a wilful assault committed by his subordinate, noted by the Circuit Court of Appeals (362, 364) is not confined to the field of actions by an employee against an employer, but is also notable in the field of actions by third persons for such assaults (26 Cyc. 1527). Professor Wigmore in a series of articles in 7 Harvard Law Review, 383 *et seq.*, has argued that as late as the eighteenth century and the beginning of the nineteenth the prevailing test of an employer's responsibility to anyone for the fault of his employee was that of "the particular command", *i. e.*, did the employer order the servant to commit the particular tortious act complaint of? In other words, the rule *respondeat superior* in the true sense had not gained acceptance. While this view may well be extreme, since earlier decisions applying *respondeat superior* may be found, on the other hand cases much later occasionally disclose a reversion to the earlier test, *e. g.*, *Mali* v. *Lord*, 39 N. Y. 381, in which merchants owning and operating a great store

were held not liable for the act of their superintendent in causing the unjustified arrest and search of a customer suspected of shoplifting. The lack of early precedents for such cases as the one at bar is, therefore, not attributable to the operation of the fellow servant rule, but to the lateness of the development of the rule that the principal is liable for the tortious acts of his subordinate performed in the course of his functions as such representative.

A reference to the facts presented by some of the cases above cited will make clear that the law generally, as well as in the Federal jurisdiction, rejects and ignores the fellow servant rule in cases where the injured employee complains of a wilful assault committed by another servant of the common master.

In *Fleming* v. *Tarboro Knitting Mills* (*supra*) the court of last resort of North Carolina affirmed a judgment in favor of the plaintiff against his employer for an assault committed by the foreman under whom the plaintiff worked. There was a conflict in the testimony as to the precise circumstances of the assault. It was conceded and was the testimony of both sides that the foreman, one Mobley, went to the part of the floor where the plaintiff was employed as an operator of a number of ribbing machines, for the purpose of remonstrating with the plaintiff about his work and in particular to make him start up the machines which were then idle. Mobley's story was that the plaintiff assaulted him. The plaintiff's testimony was that Mobley struck him with a monkey wrench. The court in its opinion said (16 N. C. at 439):

> "We think from Mobley's own evidence that he went to see plaintiff in consequence of what Clark had told him and to remonstrate with plaintiff about his work and to compel plaintiff to start up the ma

chines. In doing so he was acting for the defendant and in prosecution and furtherance of defendant's business. If while so doing he violently assaulted plaintiff with the monkey wrench, as testified to by plaintiff, the defendant would be responsible for his act.

"This question was properly presented to the jury under very clear and appropriate instructions as follows: 'The master is not responsible for wrongs done by the servant while not acting within the scope of his employment. If the servant steps aside from his master's business, for however short a time, to commit a wrong not connected with such business, the relation of master and servant will be deemed to have been for the time suspended. The test is not whether it was done during the existence of the employment, *i. e.*, during the time covered by the employment, but whether it was done in the prosecution of the master's business. It is obviously a question of fact for the determination of a jury whether at the time of the particular act or omission by the servant which caused the injury the servant was acting within the scope of his employment or acting outside of it to effect some purpose of his own."

In *Richard* v. *Amoskeag Manufacturing Co.*, 109 Atl. 88, 14 A. L. R. 1426, the Supreme Court of New Hampshire sustained a judgment against an employer brought by an employee for an assault committed by his immediate superior, a superintendent. In that case the court, after quoting from previous opinions rendered in cases where the plaintiff was not an employee, said (14 A. L. R., at 1428):

"The same principle is applicable when the assaulted party is a co-employe, and not what is termed a stranger or third party."

The court referred to the principle applied in some cases to the effect that the use of excessive force in the exercise of delegated authority renders the master liable if the employee so abusing his authority was actually authorized to use some force. The court concluded that, even thus limited, the facts of the case justified the judgment in favor of the assaulted employee. The court, however, continued (14 A. L. R., at 1429):

> "But the principle applied in cases of this character has been stated to depend, not upon the question whether the master authorized the employee or agent to use force, but upon the question whether the latter used the force complained of as a means of doing what he was employed to do."

This portion of the opinion touches upon the question of scope of employment, to which we shall refer later (Point II, *post*). Its importance at this point is in showing that the fellow servant rule is not applicable to a case of wilful assault.

5. A further basis upon which liability might be predicated is the violation of the duty to protect. Such a duty, the petitioners do not deny, rested upon the captain and would be violated by an assault which he himself committed or knowingly permitted or even which he negligently failed to prevent when put upon notice that it would be likely to occur.

It is submitted that this duty is one which extends beyond the captain and applies to any officer who is in charge of subordinate members of the crew. If, however, it be thought that such a duty cannot be regarded as a part of the admiralty law, it follows that the absence of any such general duty of protection renders more important the ad-

herence to the application of the rule *respondeat superior* which has already been made by the courts and which the petitioners now ask this Court to disavow. In this connection attention is again called to a careful and informing analysis of the problems characteristic of such cases as the one at bar. (Liability in the Admiralty for Injuries to Seamen, 19 Harv. Law Rev., 418.) In that case the commentator, after discussing the extent of the duty of protection, said (*id.*, 440):

> "It might be well for the uniformity of the maritime law if the rights of seamen to general damages for personal injuries were made to depend entirely upon contract, but until the highest courts sanction a construction of the shipping contract so liberal as to include the duty of good treatment in its most comprehensive sense, his rights must be governed in part by the law of agency."

6. It is a familiar rule of statutory interpretation that:

> "A construction placed upon a statute by inferior courts and long acquiesced in will generally be upheld, especially where the adoption of a different rule would cause great mischief." (36 Cyc. 1143.)

It is suggested as a proper corollary to this rule and one springing naturally from the application of the same principle of acquiescence, that where over a long period of years certain rulings have prevailed in the courts and thereafter a statute has been passed amending the law as so laid down in certain respects, there should be reluctance to change the law in other respects by judicial action in such a way as may limit the remedial value of the legislation passed with a purpose to maintain and approve such features of the judicial holdings as were not affected by the

remedial provisions. This situation is presented her
The courts have held the fellow-servant rule applicable t
negligence cases and not to cases of wilful assault. Sta
utes have been passed admittedly eliminating the fellow
servant rule in negligence cases. It is submitted that th
courts should not now, in the absence of any compelling re
son, recognize that rule as applicable to cases of wilf
assault.

POINT II.

**Assuming that prior to the enactment of the Mercha
Marine Act of 1920 the employer, upon such facts as a
presented at bar, might have avoided liability by invokin
either the Fellow Servant Rule or an exception to th
operation of the rule *respondeat superior*, it is manife
that the operation of that Statute is fatal to both of the
defenses, and that the petitioners are now liable und
these Statutes, if they were not before, for indemnity
the same extent as if the employment had been no
maritime and the action governed by the principles a
plicable on land.**

The Merchant Marine Act of June 5, 1920 (41 Stat. 1
U. S. Code Annotated, Title 46, Section 688; Mason's Co
Volume 3, page 3273, provides:

> "Any seaman who shall suffer personal injury
> the course of his employment may, at his electi
> maintain an action for damages at law with the ri
> of trial by jury, and in such action all statutes of
> United States modifying or extending the comm
> law right or remedy in cases of personal injury
> railway employees shall apply * * *."

This Court has held (*Panama R. R. Co.* v. *Johnson*, 264 U. S. 375, 391-2; *International Stevedoring Co.* v. *Haverty*, 272 U. S. 50) that the foregoing statute incorporates in the maritime law and makes available to a seaman seeking compensation for injuries the following provision of the Federal Employers Liability Act of April 22, 1908, 35 Stat. 65, U. S. Code Annotated, Title 45, Section 51, Mason's Code, Volume 3, page 3064:

> "Every common carrier by railroad while engaging in commerce between any of the several states or territories, * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce * * * for such injury resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier * * *."

The respondent at bar is, it is submitted, clearly entitled to invoke the foregoing statutory provisions, and the application thereof is fatal to either or both of the major objections urged by the petitioners.

Neither the objection that the rule *respondeat superior* does not apply to a seaman seeking indemnity for injuries due to a wilful assault, nor the objection that the fellow servant rule is applicable to an action for such injuries can survive the application of this statute.

A.

The rule *respondeat superior* is made available (if it was not before) to a seaman in the position of the respondent by the following words of the Merchant Marine Act itself:

> "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law," etc.

It is in this provision, if in any, that this statute extends the rule *respondeat superior* to seamen seeking compensation for injuries. The provision of the Employers Liability Act incorporated in the statute by reference has the effect according to its literal terms only of eliminating the fellow servant rule. Yet, the decisions of this Court sustaining recovery in cases of negligent injury to seamen by reason of this statute, show that the rule *respondeat superior* applies now, if it did not before, to such cases. The only language importing the introduction of that rule even by implication is that above quoted from the Merchant Marine Act itself. *That language, it is to be observed, contains no words restricting its operation to negligence cases.* If it introduces the rule *respondeat superior* in the case of a personal injury resulting from negligence, it must equally have the same effect as regards an injury resulting from a wilful assault, for the statute itself contains no limitation justifying admitting one and excluding the other.

B.

If, on the other hand, the rule *respondeat superior*, as we contend, is and was, prior to the statute, a part of the maritime law as regards rights of seamen, it follows that the real basis of the right of a seaman injured by negligence since the Merchant Marine Act of 1920 is the abolition of the fellow servant rule. In that case the fellow servant rule is abolished not merely in negligence cases, but, if it ever existed in cases of wilful assault, in those also.

This follows by reason of the fact that the Employers

liability Act uses precisely the same terms in referring to the fellow servant rule as the decisions in which that rule was defined and applied. Those decisions invariably refer to the fellow servant rule as constituting a defense to an action by an employee for personal injuries due to the negligence of a co-employee. If the word "negligence" in those decisions includes also wilful assault, it has the same inclusiveness in the remedial legislation obviously intended to change the rule. It is mere special pleading to argue that the word "negligence", in the decisions where the fellow servant rule is stated, includes wilful assault, and that in the remedial legislation the same term is restricted to cases of negligence in the sense of inadvertent fault.

C.

A further reason more persuasive than either of those above stated supports the extension to cases such as the one at bar of the Merchant Marine Act together with the Employers Liability Act to which it refers. That is the obvious purpose of Congress, to give to seamen the same protection which employees in non-maritime pursuits receive and to impose upon the employers of seamen the same obligation and interest respecting the avoidance of unnecessary injuries which are placed upon employers of workmen in non-maritime occupations. This purpose of this statute has already received judicial recognition in this Court and in others. (*International Stevedoring Co.* v. *Haverty*, 272 U. S. 50; *Encarnacion* v. *Jamison et al.*, 251 N. Y. 218 (s. c. *Jamison* v. *Encarnacion*, No. 395 on the current calendar of this Court).)

Of course it was not necessary to plead these statutory provisions (*Mo. Kans. & Tex. Ry.* v. *Wulf*, 226 U. S. 570,

576; *Second Employers' Liability Cases*, 223 U. S. 1, 53). It was sufficient to plead the essential facts which under the statutes entitled the plaintiff to recover.

POINT III.

The evidence established that Jackson, in committing the assault upon respondent, was acting within the scope of his employment.

The question whether the subordinate in committing the particular act complained of was acting within the scope of his employment is ordinarily one of fact. The question in its elements is not unlike the question of proximate cause. That this question as to scope of employment was one of fact in this case is clear from the decisions already cited (Point I, p. 21, *ante*).

All of those cases were cases of assault upon one employee by another. All of them, possibly excepting *Wolfe* vs. *Thomas*, 268 Fed. 464, *The Vueltabajo*, 163 Fed. 594, and *Spencer* v. *Kelley*, in which the assault was committed by the captain, are clearly in point, to the effect that the assault upon respondent was committed by Jackson while acting within the scope of his employment as an officer of the *Alpha* and an employee of the defendants. We shall not repeat the evidence at length. It suffices to recall that Jackson and respondent were both required to be on duty at the time when the assault actually occurred. Jackson had just come from the engine room and was attempting to secure a full engine room crew which was lacking because of respondent's absence. Jackson accordingly went after respondent, hollering to him to come

down (198). Jackson struck him for the purpose of compelling his attendance, of punishing him for his failure to report on time, and to insure compliance with the ship's routine both on his part and on the part of others of the engine room force. When Cain ran from him, Jackson followed, notwithstanding his claim that he was going to get a wiper, yet, he says, there was a wiper sitting up on the deck by the engine-room housing (199). At any rate, from all the facts, the jury were fully justified in drawing the inference that such was Jackson's purpose and in concluding that he was attempting to exercise effectually his authority, to perform the functions as an officer for which he was employed, and in particular to get his engine room manned fully for the expected departure of the ship.

The situation shown at bar was certainly as indicative of Jackson's functioning as an employee as were the corresponding facts in the cases of *The General Rucker, Memphis & N. Packet Co.* vs. *Hill,* and in all of the State Court decisions which we have cited. These decisions and the quotations from certain of the opinions disclose that whether a servant is acting within the scope of his employment does not depend upon the question whether the master authorized the offending employee to use force, but upon the question whether "he used the force complained of as a means of doing what he was employed to do" (*Richard* vs. *Amoskeag Mfg. Co.,* 14 A. L. R. at 429). See, to the same effect, the opinion of the Supreme Court of Canada in the case of *Hudson Bay* vs. *Vaillaincourt,* 2 Dom. L. R. N. S. These decisions and expressions of opinion also make clear that the offending act is not taken out of the scope of the servant's employment either because of an accompanying display of temper (*Jebeles Colias Conf. Co.* vs. *Booze,* 181 Ala.

456), or because of its criminal character—it was a crime in every one of the cases cited—or because it was not authorized or ratified by the employer.

Besides the cases which we have cited in actions between master and servant we may resort in determining the question as to scope of employment to cases of third persons assaulted by the servants of the defendant. So far as regards scope of employment and the application of the rule *respondeat superior*, the question is the same whether the person injured by the offender's wrongful act is one of his co-servants, or a stranger. The question of law remains the same. An examination of the cases in which a stranger to the employment has sued the employer in consequence of an assault committed by an employee discloses the statement and application of precisely the same rule as regards what does and does not fall within the scope of the offender's employment. We call the court's attention to the following typical cases:

Phila & Reading R. Co. v., *Derby*, 14 Howard, 468, 486;

Steamboat Co. vs. *Brockett*, 121 U. S. 637, 645;

Chesapeake, etc. R. R. Co. vs. *Stojanowski*, 198 Fed. 77;

Magar vs. *Hammond*, 183 N. Y. 387, 390-1.

To the same effect are the English cases, *e. g.*:

Bayley vs. *Manchester, etc. R. Co.*, L. R. 8 C. P. 148, 28 L. T. 366;

Dyer vs. *Munday*, 64 L. J. Q. B. 448 (1895), 72 L. T. 448.

In *Steamboat Company* vs. *Brockett* (*supra*), the United States Supreme Court, Mr. Justice Harlan writing, said (121 U. S. at 645):

> "Whether the act of the servant be one of omission or commission, whether negligent or fraudulent, 'if,' as we adjudged in Philadelphia & Reading Railroad *vs.* Derby, 14 How. 468, 486, 'it be done in the course of his employment, the master is liable; and it makes no difference that the master did not authorize or even know of the servant's act or neglect, or even if he disapproved or forbade it, he is equally liable, if the act be done in the course of his servant's employment'."

The English cases apply the same test as to the application of the rule *respondeat superior*. In *Dyer* vs. *Munday* (*supra*), the defendant's business was that of selling furniture on "the hire-purchase system". The purchaser of a bedstead from defendant had left it at plaintiff's lodging house as security for arrears of rent. One of defendant's employees going to the lodging house to recover possession of the bedstead assaulted the plaintiff. For the assault he was convicted and sentenced to pay a fine, which he did. In the civil action the Court of Appeals held the defendant employer liable. The Master of the Rolls (Lord Esher) in his opinion said (italics ours):

> "The fact that what was done was a criminal offense may be material for the consideration of the jury, but the mere fact that it was a criminal offense does not take the case out of the general rule. *The question is not whether the act was within the authority of the servant.* The authority of the servant is to do what he is told and to do it properly. But the law says that if a man, who is employed to do a thing

> properly, in the course of his employment exceeds his authority, then the master is liable. The law has always been so laid down" (Opinion, 72 L. T., at p. 449).

Lopez, L. J., said in the same case:

> "It is perfectly clear that the question whether acts are, in fact, within the scope of the employment of a servant, is one for the jury, but that the question whether the particular acts can be within the scope of the employment is for the judge. * * * Now the law is, that all acts of a servant done in the course of his employment, and in furtherance of the employment, and in the master's interest, are within the scope of the servant's employment, and that the master is liable for such acts, although they may be contrary to his express orders, and amount to a criminal offense" (*id.*).

All three of the justices constituting the Court of Appeals cited, with approval, the case of *Bayley* vs. *Manchester, etc., R. Co.* (*supra*) in which the railroad was held liable for the act of a porter in wrongfully removing a passenger from his compartment and putting him off the train. The overwhelming weight of authority is in agreement with these cases and with the authorities which we have cited in the previous point.

We call attention to a clear statement of the same rule by the New York Court of Appeals in *Magar* v. *Hammond*, *supra*. In that case the court said, Chief Judge Cullen writing (183 N. Y. at 390-1):

> "To render the defendant Hammond liable for the wilful, reckless or wanton act of Tompkins, the act must have been done by Tompkins in the scope of his employment, and whether it was so done should

be submitted as a question of fact to the jury. (Craven *v.* Bloomingdale, 171 N. Y. 439.) If Tompkins, not having the interests or services of his master in mind, and acting maliciously or in order to effect some purpose of his own, shot the plaintiff, then his master, the defendant Hammond, is not liable for the act; but if his act was within the general scope of his employment and done with a view to the furtherance of his master's business, then Hammond is liable whether the act was wilful, wanton or reckless."

POINT IV.

Petitioners' suggestion that liability on their part for the assault is excluded by the corporal punishment statute (Title 46, Section 712, United States Code Annotated) involves a forced construction and extension of that statute and is plainly untenable.

Petitioners' argument (Petitioners' Brief, pp. 31-4), based upon this statute, last amended on March 4, 1915, cannot withstand the most superficial examination. The statute in certain circumstances creates a liability against the owner, captain, etc., irrespective of any question as to the scope of employment. It gives a lien against the vessel. It certainly does not by implication repeal or outlaw any right that existed on March 4, 1915, much less does it limit the effect of the later Merchant Marine Act of 1920. Counsel can hardly expect the suggestion that Congress provided this remedy in view of the non-liability of maritime employers to be seriously considered.

CONCLUSION.

The judgment under review should be affirmed.

Respectfully submitted,

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